IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 897 OF 1989
WITH
CROSS OBJECTION ST.NO.1117 OF 1990

Bank of India,
Deolali Cantonment Branch,
Deolali, Dist. Nashik. ... Appellant.

Versus.

1. Kalu Abaji Gite
s/o.Abaji Ganpat Gite.
2. Bhausaheb Kalu Gite
s/o. Kal;u Abaji Gite.
3. Pandurang Adsare. ... Respondents.

Shri C.R.Dalvi for the Appellant.

Shri Hardas for Shri P.N.Joshi for the Respondents Nos.1 and 2.

CORAM : ABHAY S.OKA, J.

DATED : 24th March, 2005.

ORAL JUDGMENT.

1. By this Appeal the Appellant Bank of India has taken exception to the Judgment and Decree dated 27th July 1988 passed by the learned Joint Civil Judge, Senior Division, Nashik in a suit filed for recovery of the loan amount. The suit was filed against the Respondents herein. Later on the name of Respondent No.3 herein who was Defendant No.3 was deleted as he expired during the pendency of the suit. Accordingly

the name of Respondent No.3 is also deleted from the Appeal.

2. The case of the Appellant is that on the request made by the Respondents Nos.1 and 2, a loan of Rs.50,000/- was granted for purchasing a tractor with a trailor and other accessories. The Respondents Nos.1 and 2 agreed to pay interest at the rate of 4% per annum above the bank rate subject to minimum of 13% per annum or at such rate or rates as may be specified by the Appellant to the Respondents Nos.1 and 2 from time to time. Necessary documents were executed including a demand promissory note on 21st January 1975. The case of the Appellant-Bank is that by letters of acknowledgement dated 2nd January 1978 and 23rd October 1980, the Respondents admitted their liability to pay the amount to the Appellant. The prayer in the suit is for a decree in the sum of Rs.1,01,938.13 ps. with further interest thereon at the rate of 3% over the bank rate subject to minimum of 13% per annum from the date of suit till realisation.

3. Only the Respondent No.1 filed written statement. In the entire written statement the Respondent No.1 has not disputed his liability to pay the amount as claimed in the plaint. The contentions which are raised in the written statement are (i)

interest on interest cannot be charged; (ii) the suit was barred by limitation; (iii) the Respondent No.1 was an agriculturist and the loan was granted for the purpose of agriculture and therefore, further interest at the rate more than 6% per annum cannot be claimed. In the alternative, the Respondent No.1 prayed for grant of instalments.

4. The learned trial Judge on the basis of the certified extract of account produced by the Appellant at Exh.48 came to the conclusion that the amount due and payable by the Respondents was only Rs.56,065.12 ps. He therefore proceeded to pass a decree in the said amount along with interest at 13% per annum.

5. Shri Dalvi, learned Counsel appearing for the Appellant submitted that the certified extract of the account gives entries only upto February 1981. He pointed out that the suit was filed on 15th April 1982. He invited my attention to Exh.44 which is the letter of acknowledgement signed by the Respondents acknowledging their liability to pay a sum of Rs.86,911.33 together with interest from 22nd December 1978. He pointed out the claim made in the suit as far as principal amount is concerned was never disputed by the Respondents. He, therefore, submitted that the trial Court committed an error by passing a decree only in the sum of

Rs.56,065.12 ps.

6. The learned Advocate for the Respondents pointed out that admittedly loan was granted for the purpose of agriculture and hence the transaction on the basis of which the interest is claimed cannot be said to be a commercial transaction. He submitted that section 34 does not permit grant of interest above 6% per annum. He, therefore, submitted that the Appeal may be dismissed and counter-claim made by the Respondents be allowed.

7. I have considered the submissions. In the plaint a specific averment has been made after referring to the letters of acknowledgement that the amount outstanding as on 14th April 1982 was Rs.1,19,038.13 ps. The said averment is found in paragraph 10 of the plaint. In the written statement at Exh.16 filed by the Respondent No.1 there is neither a general nor a specific denial of the said averment. Though Respondent No.1 stepped into the witness box he did not dispute his signature on the letter of acknowledgement dated 23rd October 1980 which is at Exh.44. Even in his examination-in-chief the Respondent No.1 has not stated that the amount due and payable on the date of institution of the suit was only Rs.56,065.12. On a plain reading of the certified extract of the loan

account at Exh.48, it is apparent that the last entry therein is of February 1981. The suit was filed on 15th April 1982. Therefore, the learned Judge could not have taken the amount shown in the extract as the amount due and payable on the date of the suit. There is no denial by the Respondent of the correctness of the quantum of the principal amount claimed under prayer clause (a) of the plaint. Thus the learned trial Judge has committed an error in decreeing the suit only to the extent of the sum of Rs.56,065.12 ps. The trial Court ought to have pased a decree for the principal amount of Rs.1,09,938.13 as there was no denial to the averments made in paragraph No.10 of the plaint.

8. The learned Advocate for the Respondents while making submission in support of his cross-objection pointed out that the P.W.1 Shri Raju S.Pathade examined by the Appellant who was an Agricultural Finance Officer of the Appellant admitted that the loan was granted for the purpose of agriculture. He pointed out specific plea raised in the written statement and in particular paragraph 8 thereof that the loan was granted for agriculture purpose. He pointed out the evidence of Respondent No.1 in which he clearly asserted that he was an agriculturist. There is no cross examination on this aspect. In fact in the examination-in-chief, he asserted that he has no other income except the income

from the agriculture.

9. Section 34 of the Code of Civil Procedure, 1908 reads thus:

> 34. Interest. (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent, per annum, as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment or to such earlier date as the Court things fit;
>
> . Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the date of such further interest may exceed six per cent, per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in

relation to commercial transactions.

. Explanation I.- In this sub-section, "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970).

. Explanation II.- For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

. (2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie."

Explanation 2 provides that a transaction is a commercial transaction if it is connected with the industry, trade or business of the party incurring the liability.

10. P.W.3 Shri Shashikant Yeshwant Dhawale examined by the Appellant categorically admitted in the Cross-exmaination that the Respondents were given

agricutlural loan. The liability which is the subject matter of the suit cannot be said to have arisen out of commercial transaction and therefore, interest under section 34 of the said Code could not have exceeded 6% per annum. Hence, the cross objection deserves to be allowed to that extent.

11. Accordingly the following order is passed:

i) The First Appeal and the Cross Objection are partly allowed. The operative part of the Judgment of the trial Court is substituted by the following:

"(a) The Defendants shall jointly and severally pay to the Plaintiff a sum of Rs.1,01,938.13 ps. with proportionate costs.

(b) The decretal amount will carry an interest at the rate of 6% per annum from the date of institution of the suit till realisation.

(c) There will be a charge on the tangible properties and standing crop of the Respondents for the decretal amount."

ii) Since both the parties have partly succeeded in the Appeal and in cross objection, there will be no order as to costs in the Appeal and cross objection.

iii) If any amount is paid by the Respondents on the basis of the decree passed by the trial Court, the Respondents will be entitled to necessary adjustment.

iv) Time of four months is granted to the Respondents to comply with the decree.

Judge.